

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRIAN PYE,

Plaintiff and Appellant,

v.

DANIEL O. ROBINSON et al.,

Defendants and Respondents.

D052689

(Super. Ct. No. ECU02044)

APPEAL from an order following judgment of the Superior Court of Imperial County, Harold Bradford, Judge. (Retired judge of the Alpine Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

In this action arising out of the sale of the assets of a corporation, minority shareholder Brian Pye asserted he was entitled to his one-third interest in the corporation, which majority shareholder Daniel O. Robinson had deposited into the trust account of attorney Eduardo Rivera. He further alleged Robinson used his corporation, Robinson Ford Sales Inc. (Robinson Ford), to convert his share of the proceeds. Pye also asserted

that Rivera breached his fiduciary duty in assisting Robinson in the conversion.

Following a court trial, Pye prevailed on his claims, and the court entered judgment in his favor in the amount of \$16,437.70. However, Pye did not request, and the court did not order, that prejudgment interest be included in the judgment as a part of Pye's damages.

Thereafter, Pye brought a motion for costs, which was amended to request prejudgment interest. The court denied the request for prejudgment interest as procedurally improper and untimely.

On appeal, Pye contends the court erred in failing to award prejudgment interest because (1) he requested an award prior to entry of judgment; (2) the court had jurisdiction to correct the judgment under Code of Civil Procedure<sup>1</sup> section 473; and (3) it was a clerical error that the court could correct at any time. Robinson and Robinson Ford argue the appeal should be dismissed as the notice of appeal was filed late.

We deny Robinson's motion to dismiss the appeal. We also conclude the court did not err in refusing to award prejudgment interest, and therefore affirm the judgment.

## FACTUAL BACKGROUND<sup>2</sup>

Pye and Robinson formed a corporation called Portico Express, Inc. (Portico) to run a gas station and minimart in Calexico, California. Pye's share of the corporation was one-third, and Robinson's two-thirds. Because of disagreements between Pye and

---

<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise specified.

<sup>2</sup> Because the parties do not dispute the accuracy of the facts as stated in the court's statement of decision, we take the factual background largely from that document.

Robinson, Robinson assumed control of all corporate operations and its sole business asset, the gas station/mini-mart.

Pye relocated to San Diego County. At all times, Robinson knew Pye's address and telephone numbers.

In 1998 Robinson arranged for a sale of the gas station/mini-mart to Jose and Martha Ortega and opened escrow to complete the sale. Pye notified the escrow holder of his interest in the property and his status as guarantor of a Small Business Administration loan. Upon receipt of \$15,000, he withdrew his objections to the sale.

Anticipating there would be net proceeds from the sale of the business, in May 1999 Pye and Robinson entered into an agreement prepared by Rivera, who was the attorney for Robinson and Robinson's other corporation, Robinson Ford. The agreement called for the net proceeds of the sale to be deposited in an interest-bearing trust account administered by Rivera, for the benefit of Pye and Robinson after the rights and liabilities of the parties were determined.

In August 1999 the proceeds of the sale, \$35,437.22, were delivered to Rivera, who deposited them in his trust account (although it was not interest-bearing). Additional funds from the escrow were received by Rivera, representing a refund of overpayment of taxes, making the total amount deposited into the trust account \$49,313.10. At all times Rivera held these monies in his trust account he was aware of Pye's address, phone number, and FAX number, but Rivera made no effort to notify Pye of any of his subsequent actions.

Robinson began making demands on Rivera that he give him the funds in the trust account. However, Rivera told Robinson that because of the agreement with Pye, he could not simply turn over the funds to him. Instead, they came up with the following plan.

Rivera referred Robinson to attorney Bennett Goodman, who "lent" his name and State Bar number to a complaint prepared by Rivera. The complaint named Robinson Ford as plaintiff and Portico as defendant. The complaint sought monies allegedly owed by Portico to Robinson for "loans and advances." Goodman was the attorney of record for Robinson Ford, but admitted he did nothing substantive with regard to the lawsuit. The complaint was signed by Robinson as owner/officer of Robinson Ford and was then served on Robinson as agent for Portico. No answer was filed and a default judgment was taken against Portico. A writ of execution was issued and levied on the funds held in Rivera's trust account. In October 2000 Rivera delivered \$13,137.82, the amount remaining in the trust account, to Robinson Ford. The other \$18,000 had been previously withdrawn by Rivera allegedly on behalf of Portico. Pye was not informed of these events.

In January 2004 Pye, through his attorney, began making inquiries concerning the status of the funds in Rivera's trust account and was advised by Rivera that they had been taken by a writ of execution.

## PROCEDURAL BACKGROUND

In December 2004 Pye filed suit against Robinson, Rivera and Goodman, alleging claims for conversion, breach of fiduciary duty, and conspiracy. In his complaint, Pye requested prejudgment interest.

This matter came on for a court trial. In his written closing argument, Pye requested that, in addition to damages, the court award him prejudgment interest.

Following trial, the court issued a statement of decision. The court found in Pye's favor against Robinson and Rivera, finding they breached their fiduciary duties to him and converted funds owing to him. The court also found Robinson Ford was the alter ego of Robinson. The court denied Pye's request for punitive damages. The court also found Goodman not liable, with the exception of sanctions previously ordered by the court, even though the court expressed "regret that an attorney in good standing with the State Bar would lend his name and professional standing to an obviously sham piece of legal work." The court awarded Pye \$16,437.70, jointly and severally against Robinson and Rivera, "representing one-third of the funds deposited into the trust account." The statement of decision also directed Pye to prepare the judgment in the case. The statement of decision made no mention of prejudgment interest.

The judgment, filed September 11, 2007, and prepared by counsel for Pye, was identical to the statement of decision and did not mention prejudgment interest. Notice of entry of judgment was mailed September 13, 2007.

Pye served a memorandum of costs and, thereafter, on October 5, 2007, Pye brought a "Motion to Augment his Cost Bill" to add \$26,522.66 in compounded

prejudgment interest. Robinson opposed the motion, arguing (1) under *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824 (*North Oakland*) the motion was late as it was required to be brought before entry of judgment or, at the latest, within the time to bring a motion for new trial; (2) the court could not award interest as a cost item as it was an item of damages; and (3) even if the court had the discretion to award prejudgment interest it should not as there was never a sum certain from which to calculate interest.

Pye filed supplemental points and authorities (1) attempting to distinguish *North Oakland* and (2) arguing the court had the power to vacate the judgment under section 473, subdivision (d) as the court's failure to award prejudgment was a clerical error.

The court denied the motion for prejudgment interest. In doing so, the court first found that Pye had properly requested prejudgment interest in his complaint and closing statement. However, the court also noted that it had "instructed [Pye] to prepare the judgment." In doing so, the court assumed (erroneously, as it turned out) that plaintiff would include in that document matters best left to the plaintiff to compute: costs, if the figures were then available, interest, or at least a statement concerning postjudgment interest, and similar matters. The court further found, "It is abundantly clear that prejudgment interest is a part of a judgment, not an item of cost, and none of the procedures whereby plaintiff might seek augmentation or modification of the judgment appear to be available. It is no comfort to plaintiff to know that the Court would have approved a judgment that included prejudgment interest, as he is clearly entitled to it. However caused, by failure of communication by the Court concerning preparation of the

Judgment, or inattention of the Court or counsel to inclusion of the prejudgment interest in the judgment, there appears to be no remedy available to plaintiff, or to the Court, for that matter, to rectify what appears to be an oversight or error. But for the decision in [*North Oakland, supra*, 65 Cal.App.4th 824], this Court would be inclined to add prejudgment interest to the previously approved Judgment, as a matter of justice and equitable administration thereof. However, this trial court is in no position to openly act contrary to a published opinion of a California appellate court."

## DISCUSSION

### I. *MOTION TO DISMISS APPEAL*

Robinson and Robinson Ford have brought a motion to dismiss this appeal, asserting Pye's notice of appeal is untimely. Specifically, they argue that the appeal should have been from the judgment in this matter, not the postjudgment motion to add prejudgment interest. We reject this contention.<sup>3</sup>

Section 904.1, subdivision (a) provides in part: "An appeal, other than in a limited civil case, may be taken from any of the following: [¶] (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222. [¶] (2) From an order made after a judgment made appealable by paragraph (1)."

---

<sup>3</sup> By order dated May 29, 2008, we ordered the motion to dismiss the appeal be considered with the appeal.

An order denying a motion to set aside a judgment under section 473 is appealable under this section as an order after judgment. (*Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 294, fn. 4; *Hollister Convalescent Hospital, Inc. v. Rico* (1975) 15 Cal.3d 660, 663.) Similarly, an order denying an award of costs is appealable under this section. (*Kajima Engineering & Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402.)

As discussed, *ante*, Pye brought the motion seeking prejudgment interest as an item of costs or, alternatively based upon section 473, arguing the court's failure to award that sum was a clerical error. Accordingly, Pye properly appealed from the order denying that relief, and his notice of appeal is timely.

### I. MERITS

Civil Code section 3287, subdivision (a), provides in part, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt." Where a claim is based upon the wrongful obtaining of money, i.e., conversion, and the amount taken is capable of ascertainment, the plaintiff is entitled to prejudgment interest. (*Moreno v. Greenwood Auto Center* (2001) 91 Cal.App.4th 201, 209.)

In *North Oakland, supra*, 65 Cal.App.4th 824, the jury returned a special verdict in favor of plaintiffs on a claim for breach of an oral contract. No interest was included in the special verdict form, and the jury awarded none. (*Id.* at p. 827.) Plaintiffs thereafter



filed a memorandum of costs, but did not request prejudgment interest. Defendants moved to tax costs and that motion was denied following a hearing. Thereafter, the plaintiffs presented an order to the court that awarded the costs and also included prejudgment interest. After the judgment was entered, the trial court set aside the award of prejudgment interest on the ground that plaintiffs were precluded from recovering interest on the debt because they had failed to bring a motion or in any other manner request such interest. (*Id.* at pp. 827-828.)

The Court of Appeal affirmed. In doing so, the court noted that "there is no authority mandating any particular procedure for securing an award of prejudgment interest" (*North Oakland, supra*, 65 Cal.App.4th at p. 829), but set forth several "general principles" which apply to such an award. The court noted that "[a] general prayer in the complaint is adequate to support an award of prejudgment interest." (*Ibid.*) However, the court specified that "[t]he issue here is not whether plaintiffs' complaint adequately invoked the court's power to award prejudgment interest . . . . Rather, the question we address is whether plaintiffs timely requested the court to exercise its power to determine whether plaintiffs were entitled to interest under [Civil Code] section 3287 in circumstances where damages had been awarded but no interest was included in the verdict and where neither court nor jury had determined whether the damages were liquidated or unliquidated." (*North Oakland, supra*, at p. 829.) The court determined that plaintiffs did not. As the Court of Appeal explained, "It is well established that prejudgment interest is not a cost, but an element of damages." (*Id.* at p. 830.) Accordingly, the court concluded that a bill for costs is not an appropriate vehicle for

requesting interest, but rather "prejudgment interest should be awarded in the judgment on the basis of a specific request therefore made *before* entry of judgment." (*Ibid.*) As support for its decision, the court cited California Rules of Court, rule 875, which stated at that time, "The clerk shall include in the judgment any interest awarded by the court and the interest accrued since the entry of the verdict."<sup>4</sup> The *North Oakland* court also concluded that, "at the latest, a request for prejudgment interest under [Civil Code] section 3287 may be sought as part of a motion for new trial pursuant to Code of Civil Procedure section 657, on the grounds of '[e]xcessive or inadequate damages.' [Citation.]" (*North Oakland, supra*, 65 Cal.App.4th at p. 830.) The court concluded, "[R]equests for prejudgment interest under [Civil Code] section 3287 by a successful plaintiff must be made by way of motion prior to entry of judgment, or the request must be made in the form of a motion for new trial no later than the time allowed for filing such a motion." (*North Oakland, supra*, at p. 831.)

Thus, under this authority, which we find persuasive, Pye's motion to "augment" the cost bill to include prejudgment interest was both untimely and procedurally flawed. As noted by the Court of Appeal in *North Oakland*, prejudgment interest is *not* an item of costs, but constitutes a type of damages. Therefore, Pye was required to include this item in the judgment. Moreover, Pye did not move for a new trial on the ground he was awarded insufficient damages.

---

<sup>4</sup> California Rules of Court, rule 875 was renumbered rule 3.1802 effective January 1, 2007, and now states: "The clerk *must* include in the judgment any interest awarded by the court and the interest accrued since the entry of the verdict." (*Italics added.*)

Pye also could not set aside the judgment to add prejudgment interest as a "clerical error" under section 473, subdivision (d) (section 473(d)). That section provides: "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

The failure to include interest in this matter was not a "clerical" mistake. Clerical error refers to inadvertent errors in entering or "recording the judgment rendered." (*In re Candelario* (1970) 3 Cal.3d 702, 705.) A judicial error, by contrast, "which cannot be corrected by amendment" under section 473(d), occurs when "the error was made in rendering the judgment." (*In re Candelario, supra*, at p. 705.)

As Witkin states, "Before entry, the judge may freely alter the judgment rendered. [Citation.] But once the judgment is entered, the judge loses this unrestricted power to change it. If the entry conforms to the judgment as rendered, and there is no clerical error in the rendition or entry, there can be no summary amendment by the court itself no matter how wrong in law the decision may be. Judicial error, i.e., an erroneous decision, can only be rectified by the regular procedures for attack on judgment: motion for a new trial, motion to vacate judgment, appeal, or an independent action in equity." (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 65, p. 600.)

Here, the omission of prejudgment interest in the judgment was not a clerical error by the court. While the court stated that *if properly raised by Pye* it would have awarded prejudgment interest to him, no such timely application was made. The court ordered

Pye to prepare the judgment, but counsel did not include prejudgment interest therein or timely move for such an award. The judgment entered conformed exactly to the court's statement of decision. Thus, the judgment entered was the judgment the court intended, and relief is not available to Pye under section 473(d). As Pye has not asserted there is any other basis for relief from the judgment that did not award prejudgment interest, the court did not abuse its discretion in refusing to set aside the judgment to award prejudgment interest.<sup>5</sup>

#### DISPOSITION

The order after judgment denying Pye's request for prejudgment interest is affirmed. Defendants shall recover their costs on appeal.

---

NARES, J.

WE CONCUR:

---

McCONNELL, P. J.

---

O'ROURKE, J.

---

<sup>5</sup> In his motion to augment his memorandum of costs, and in his opening brief on appeal, Pye briefly cites to section 128, subdivision (a)(8) which provides in part: "Every court shall have the power to do all of the following: [¶] . . . [¶] (8) To amend and control its process so as to make them conform to law and justice." However, he does not thereafter explain how this section assists his cause. Accordingly, we need not address this code section. At any rate, this code section, like section 473(d), only applies to motions seeking to set aside orders based upon alleged clerical error. (*Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 148.)